US Department of Labor Withdraws Independent Contractor Rule

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On May 6, 2021, President Biden's administration halted implementation of a rule published under the Trump administration which would have made it easier for businesses to classify workers as independent contractors instead of employees.



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The Trump regulation was supported by the "gig economy" industry, such as ride-share and delivery companies, who tend to classify their workforce as independent contractors. Treating workers as independent contractors rather than employees can avoid the application of employment laws, including the Fair Labor Standards Act (FLSA), which entitles employees to the payment of minimum wage, overtime pay, and other protections.

This regulation was set to implement a modified test for determining whether a worker is legally classified as an independent contractor. However, the U.S. Department of Labor issued a new rule withdrawing the previously-published regulation before it could take effect. The new rule does not provide a replacement analysis, but instead the Department of Labor will revert to the multi-factor analysis created by court precedent.

Under federal law, the Department of Labor and courts look to a variety of factors to determine whether a worker is an employee or an independent contractor under the totality of the circumstances, based on the "economic reality." The test can involve a complex analysis to evaluate the nature of the relationship, and no one factor or combination of factors is necessarily determinative. Among the factors considered are the following:

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1. The extent to which the services rendered are an integral part of the employer's business.
2. The permanency of the relationship.
3. The amount of the individual's investment in facilities and equipment.
4. The nature and degree of control by the employer.
5. The individual's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the individual.
7. The degree of independent business organization and operation.

The Trump rule would have modified the analysis, placing primary consideration on two core factors: 1) the nature and degree of control over the work, and 2) the worker's opportunity for profit or loss. Additionally, the analysis would consider 3) the amount of skill required for the work, 4) the degree of permanence of the working relationship between the worker and the potential employer, and 5) whether the work is part of an integrated unit of production.

It is unknown whether the Department of Labor will propose a new rule in the future, but there have been indications that any new rule issued by the Biden administration is likely to narrow the test to make it harder to classify workers as independent contractors.

Employers in Massachusetts should be mindful that notwithstanding the analysis under federal law, state law provides a stricter test for determining whether a worker is properly classified as an independent contractor for most purposes. In Massachusetts, in order to treat a worker as an independent contractor, the employer must show all three of the following factors:

1. The individual is free from control and direction in the performance of the work.
2. The service is performed outside the usual course of the business of the employer.
3. The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as the work performed.

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Misclassification of workers as independent contractors may have significant legal consequences for employers. Should you have any questions regarding the proper classification of your workforce, please contact one of the attorneys in the Labor, Employment and Benefits Practice Group.

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